Supreme Court, U.S.
FILED
NOV 23 2015
OFFICE OF THE CLERK

No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Baldasar v. *Illinois*, 446 U.S. 222 (1980) 6, 7
Daniels v. *United States*, 532 U.S. 374 (2001) 10
Graham v. *West Virginia*, 224 U.S. 616 (1912) 8
Gryger v. *Burke*, 334 U.S. 728 (1948) 8
Lewis v. *United States*, 445 U.S. 55 (1980) 9
Nichols v. *United States*, 511 U.S. 738 (1994) 7, 10
United States v. *Ant*, 882 F.2d 1389 (9th Cir. 1989) 2
United States v. *Cavanaugh*, 643 F.3d 592 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012) 1, 3
United States v. *Lonjose*, 42 Fed. Appx. 177 (10th Cir.), cert. denied, 537 U.S. 984 (2002) 9
United States v. *Shavanaux*, 647 F.3d 993 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012) 2

Constitution, statutes and guidelines:

U.S. Const. Amend. VI 3, 7
Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* 5
25 U.S.C. 1301(2) 5
25 U.S.C. 1302(c) 8
25 U.S.C. 1304 5
25 U.S.C. 1304(a)(6) 5
25 U.S.C. 1304(b)(1) 5
25 U.S.C. 1304(d) 5
18 U.S.C. 117 7
18 U.S.C. 117(a) ..... *passim*
United States Sentencing Guidelines:
§ 4A1.2(i) 9
§ 4A1.3(a)(2)(A) 9

Miscellaneous: Page

Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403 (2004)..... 9

In the Supreme Court of the United States

No. 15-420

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Ninth Circuit in this case—over the dissent of eight judges from the denial of rehearing en banc (Pet. App. 40a-54a)—held that 18 U.S.C. 117(a) is unconstitutional as applied to recidivist domestic-violence offenders who have uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. Respondent agrees that the Ninth Circuit's decision creates a circuit conflict, and he does not dispute that the issue is important. Respondent nevertheless contends (Br. in Opp. 9-26) that this Court should deny the petition for a writ of certiorari because, in his view, the Ninth Circuit's decision is correct. But respondent's effort to defend the decision lacks merit and provides no basis for denying review. The petition for a writ of certiorari should be granted.

1. Respondent acknowledges (Br. in Opp. 26-27) that the Ninth Circuit's decision in this case conflicts with decisions of the Eighth and Tenth Circuits. See *United States* v. *Cavanaugh*, 643 F.3d 592 (8th Cir.

2011), cert. denied, 132 S. Ct. 1542 (2012); *United States* v. *Shavanaux*, 647 F.3d 993 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012). Because the vast majority of federally recognized tribes are located in the three circuits that have considered the question presented, Section 117(a)'s applicability to habitual offenders with uncounseled tribal-court misdemeanor convictions that resulted in imprisonment will differ based on the geographical happenstance of the circuit in which the offenders reside. See Pet. 24. Respondent nevertheless argues that the division in authority could resolve itself because the cases in the Eighth and Tenth Circuits "were not decided en banc." Br. in Opp. 26. That argument is unavailing.

Respondent offers no reason to believe that the Eighth and Tenth Circuits will reconsider their decisions holding that Section 117(a) may constitutionally be applied to defendants with prior uncounseled tribal-court misdemeanor convictions. Indeed, in upholding Section 117(a) as applied to those offenders, *Shavanaux* and *Cavanaugh* expressly disagreed with the Ninth Circuit's analysis in *United States* v. *Ant*, 882 F.2d 1389 (1989), which held that an uncounseled tribal-court guilty plea that resulted in imprisonment is inadmissible in a federal prosecution arising out of the same incident. *Id.* at 1395; see Pet. App. 15a n.6 (noting that "both the Eighth Circuit and the Tenth Circuit recognized that their holdings were at odds with *Ant*"). The Tenth Circuit rejected "*Ant*'s threshold determination that an uncounseled tribal conviction is constitutionally infirm" because "the Bill of Rights does not constrain Indian tribes." *Shavanaux*, 647 F.3d at 997-998. Similarly, the Eighth Circuit disagreed with *Ant*'s rationale that "prior tribal court

proceedings should be *treated* as involving constitutional violations where a similar absence of counsel would have violated the Sixth Amendment had it occurred in federal or state court." *Cavanaugh*, 643 F.3d at 604. Instead, the Eighth Circuit declined to "preclude the use of such a conviction in the absence of an actual constitutional violation." *Id.* at 605.

The defendants in *Shavanaux* and *Cavanaugh* sought rehearing en banc, urging the courts of appeals to reconsider their holdings and follow the Ninth Circuit's approach in *Ant*. See Pet. for Reh'g En Banc 2-3, 7, 10, 12, *Shavanaux*, *supra*, No. 10-4178 (Aug. 16, 2011); Pet. for Reh'g, With Suggestion for Reh'g En Banc 8-10, *Cavanaugh*, *supra*, No. 10-1154 (July 20, 2011). But the Eighth and Tenth Circuits denied the petitions for rehearing en banc with no recorded dissent. See Order, *Shavanaux*, *supra* (Sept. 8, 2011); Order, *Cavanaugh*, *supra* (Aug. 12, 2011). There is accordingly little chance those courts will revisit their precedent in light of the Ninth Circuit's decision in this case, which reaffirmed "*Ant*'s continued vitality" and deemed it binding on the question of Section 117(a)'s constitutionality. Pet. App. 15a-16a.

Moreover, respondent ignores the conflict between the Ninth Circuit's decision and cases holding that an uncounseled misdemeanor conviction may be relied upon in a subsequent prosecution, even if the prior conviction impermissibly resulted in a sentence of imprisonment. See Pet. 22-23. Judge Owens emphasized that the Ninth Circuit panel in this case "split[] with every circuit to seriously consider this issue." Pet. App. 41a. Because these circuit conflicts will persist until this Court intervenes, further review is warranted.

2. Respondent does not dispute that the issue presented here is important and recurring. As respondent acknowledges (Br. in Opp. 27-28), Section 117(a) "was developed to combat a serious problem with domestic violence in tribal communities," which respondent agrees is "a legitimate concern." The facts of this case well illustrate the problem: Respondent repeatedly assaulted his intimate partners on tribal land, yet he received only misdemeanor-level punishment again and again. As Judge Owens observed:

> [Respondent] likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out. Although his violence varies, his punishment never does. Despite [respondent's] brutality—resulting in seven convictions for domestic violence—his worst sentence was a slap on the wrist * * * .

Pet. App. 40a.

The cycle of violence perpetrated by respondent is unfortunately not unique. "American Indian and Native Alaskan women experience domestic violence at far greater rates than other American women." Br. of Nat'l Congress of American Indians as Amicus Curiae 2; see *id.* at 4-8 (summarizing statistics); Pet. 24-25 (same). Until Section 117(a) was enacted, however, it was frequently difficult to charge Indian habitual offenders with a felony. See Pet. 25. Accordingly, "[t]here are many, many men like [respondent]," who have multiple uncounseled tribal-court misdemeanor convictions for domestic violence—"[a]nd

there are even more victims of men like [respondent]." Pet. App. 40a (Owens, J., dissenting from denial of rehearing en banc). Because the Ninth Circuit's decision frustrates Congress's effort to combat domestic violence on tribal lands by invalidating Section 117(a) as applied to those repeat offenders if their prior convictions resulted in imprisonment, this Court's review is warranted.[1]

3. Respondent devotes his brief in opposition primarily to defending the decision below on the merits. Br. in Opp. 9-26. In general, respondent's arguments paraphrase the Ninth Circuit's reasoning, and as the government explained in the petition, that reasoning is erroneous. See Pet. 12-16.

The principal flaw in respondent's argument is his contention (Br. in Opp. 16) that tribal-court convictions have a chameleon-like quality. Respondent acknowledges that his tribal-court convictions did not violate the Constitution or the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.*, when they were

---

[1] Respondent argues (Br. in Opp. 28) that "[a]ny concerns about * * * writing § 117(a) off the books is availed by [25 U.S.C.] 1304," which recognizes the inherent power of tribes "to exercise special domestic violence criminal jurisdiction" and requires tribes to provide certain procedural protections when exercising that authority. 25 U.S.C. 1304(b)(1) and (d). But the statute defines "special domestic violence criminal jurisdiction" to "mean[] the criminal jurisdiction that a participating tribe may exercise under this section *but could not otherwise exercise*." 25 U.S.C. 1304(a)(6) (emphasis added). Because the "powers of self-government" possessed by Indian tribes "include[] the inherent power * * * to exercise criminal jurisdiction over all Indians," 25 U.S.C. 1301(2), Section 1304 generally has no application to Indians, like respondent, who commit repeated acts of domestic violence on tribal land.

obtained, and that the convictions were valid for purposes of imposing punishment in the tribal proceedings. See Br. in Opp. 6. And respondent has not otherwise challenged the validity or reliability of his domestic-violence convictions through a writ of habeas corpus in federal court or through further proceedings in tribal court. Indeed, respondent accepts that, if he were prosecuted as a habitual offender in tribal court, his prior convictions for domestic violence "would be valid" in a subsequent tribal proceeding. *Id.* at 11. Yet respondent maintains that his "prosecution * * * in federal court under § 117(a) changes the earlier tribal court convictions," making them "no longer exist" because, in respondent's view, "they are no longer valid." *Id.* at 16.[2]

Respondent's argument resurrects the (now overruled) result in *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), which held that an uncounseled state-court misdemeanor conviction that was constitutionally valid because no term of imprisonment was imposed could not be used to classify the offender as a recidivist in a subsequent prosecution. *Id.* at 222-224. Dissenting in *Baldasar*, Justice Powell observed that the Court's ruling was "analytically unsound" because it "create[d] a special class of uncounseled misde-

---

[2] Respondent's purported concern (Br. in Opp. 27) about preserving tribal sovereignty rings hollow in light of his suggestion that uncounseled tribal-court convictions should be treated as though they do not exist. See Pet. App. 20a (Watford, J., concurring) (observing that this result "denigrat[es] the integrity of tribal courts"); see also Br. of Nat'l Congress of American Indians as Amicus Curiae 16-17 (urging this Court to grant review of the Ninth Circuit's decision because it "undermines the delicate balance Congress has struck between tribal sovereignty and defendants' rights").

meanor convictions" that "are valid for the purposes of their own penalties" but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." *Id.* at 232, 234 (Powell, J., dissenting). Justice Powell's analysis was vindicated when this Court overruled *Baldasar* in *Nichols* v. *United States*, 511 U.S. 738 (1994). *Nichols* held that "an uncounseled misdemeanor conviction" that is "valid * * * because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.* at 748-749. The Court should take this occasion to reject respondent's argument and reaffirm *Nichols*' rule that a conviction that did not violate the Sixth Amendment when it was obtained also does not violate the Sixth Amendment when it is used in a subsequent prosecution.

Respondent attempts to supplement the Ninth Circuit's reasoning (Br. in Opp. 19) by disputing that "his case is a federal recidivist prosecution" at all. Respondent asserts (*id.* at 16) that "[u]nlike sentencing enhancement or recidivist statutes which penalize the last offense, prosecution under § 117(a) in federal court hinges on the existence of two prior tribal court convictions to establish a crime even occurred." But Section 117—which is titled "Domestic assault by *an habitual offender*"—is violated only when a person who has two prior domestic-violence convictions "commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country." 18 U.S.C. 117(a) (emphasis added). The statute clearly penalizes the last offense, and relies on the fact of the prior convictions to identify the class of offenders who should be subject to that penalty. Section 117(a) accordingly fits comfortably

within the long line of this Court's precedents holding that recidivist statutes do not impose additional punishment for prior crimes, but rather provide "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); see, *e.g.*, *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912) (recognizing that repeat offenders "are not punished the second time for the earlier offense," but instead "the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted").

Respondent further suggests (Br. in Opp. 15, 25) "that uncounseled convictions are categorically unreliable."[3] That argument is hard to square with respondent's concession (*id.* at 11) that his prior convictions are reliable enough to permit his prosecution as a repeat offender in tribal court. Respondent also

---

[3] Respondent observes (Br. in Opp. 25) that Congress enhanced the sentencing authority of tribes in 2010 but required them to provide appointed counsel if they sentence a defendant to a term of incarceration exceeding one year. See 25 U.S.C. 1302(c); Pet. 25 n.5. By not extending the same right to appointed counsel when a tribal-court defendant faces only misdemeanor punishment, including a term of imprisonment of one year or less, Congress reaffirmed its judgment that counsel is not necessary in that circumstance—particularly given the other procedural protections conferred by ICRA. See Pet. 2-3, 19 (summarizing relevant provisions); Br. of Nat'l Congress of American Indians as Amicus Curiae 12-15. It is undisputed that respondent's tribal-court sentences for domestic violence never exceeded one year. See Pet. 4; Pet. App. 40a (Owens, J., dissenting from denial of rehearing en banc). Respondent states (Br. in Opp. 25) that he "received a sentence of forty-six months—significantly more than one year." But that was the sentence for his convictions under Section 117(a), and respondent had appointed counsel in the federal proceeding.

appears to acknowledge (*id.* at 10-11) that uncounseled tribal-court misdemeanor convictions may serve as predicate offenses for a Section 117(a) prosecution so long as the tribal court did not impose a term of incarceration, but he does not explain why the tribal court's sentencing determination would make those convictions any more or less reliable.[4]

---

[4] Respondent argues (Br. in Opp. 18-19) that it would be "illogical" to rely on his uncounseled tribal-court convictions in a prosecution under Section 117(a) because the Sentencing Guidelines do not assign criminal-history points based on tribal offenses. See Sentencing Guidelines § 4A1.2(i). As respondent recognizes, however, the Guidelines further provide that tribal convictions may form the basis for an upward departure when the calculated criminal-history category is inadequate. See Sentencing Guidelines § 4A1.3(a)(2)(A); see also, *e.g.*, *United States* v. *Lonjose*, 42 Fed. Appx. 177, 180 (10th Cir.) (observing that "the consideration of * * * tribal court convictions is generally encouraged" under the Guidelines), cert. denied, 537 U.S. 984 (2002); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 436 (2004) ("Despite the general rarity of upward departures, federal judges have often used the existence of a lengthy tribal criminal history to justify an upward departure in Indian country cases.") (footnote omitted).

In any event, Section 4A1.2(i) of the Guidelines applies even if an uncounseled tribal-court conviction did not result in imprisonment, and it also applies when a tribal-court defendant has appointed counsel in the tribal proceedings. In both of those circumstances, respondent acknowledges that the tribal-court conviction may be relied upon to satisfy Section 117(a)'s predicate-offense element, even though the tribal offense would not be counted under the Guidelines in calculating the defendant's criminal-history category at sentencing. More fundamentally, Congress is not bound by the United States Sentencing Commission's approach to tribal-court convictions, and the Guidelines certainly fall short of establishing that Congress acted irrationally in permitting tribal-court convictions to serve as predicate offenses in a Section 117(a) prosecution. See *Lewis* v. *United States*, 445 U.S. 55, 65 (1980).

Respondent also asserts (Br. in Opp. 13) that uncounseled tribal-court defendants may not "appreciat[e] the penalties and disabilities their uncounseled convictions will subject them to." But the same argument was made and rejected in *Nichols*, which declined to find that "due process requires an [uncounseled] misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime." 511 U.S. at 748. The *Nichols* Court reasoned that a warning that the defendant "will be treated more harshly" if "he is brought back into court on another charge * * * would merely tell him what he must surely already know." *Ibid.* Respondent's knowledge that he had multiple domestic-violence convictions in tribal court should have "serve[d] as an incentive not to commit a subsequent crime and risk" being classified as a recidivist. *Daniels* v. *United States*, 532 U.S. 374, 381 n.1 (2001). Because respondent instead chose to continue assaulting his domestic partners, he should not be heard to complain that his actions exposed him to prosecution under Section 117(a).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

NOVEMBER 2015